Supreme Court, U.S.
FILED
03-1722 JUN 25 2004

No.

IN THE

Supreme Court of the United States

VERIZON INTERNET SERVICES, INC.,

Cross-Petitioner,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether the issuance and enforcement of binding judicial process pursuant to 17 U.S.C. § 512(h), outside the context of a "case or controversy," violates Article III of the United States Constitution and fundamental principles of the constitutionally mandated separation of powers.

PARTIES TO THE PROCEEDING

Cross-respondent Recording Industry Association of America, Inc. was the appellee below. Cross-petitioner Verizon Internet Services Inc. was the appellant. The United States intervened pursuant to 28 U.S.C. § 2403 solely to defend the constitutionality of the Digital Millennium Copyright Act.

RULE 29.6 DISCLOSURE

Cross-petitioner is a wholly owned subsidiary of Bell Atlantic Entertainment and Information Services Group, Inc. Bell Atlantic Entertainment and Information Services Group, Inc. is a wholly owned subsidiary of Bell Atlantic Investment Development Corporation, which is a wholly owned subsidiary of Verizon Investments Inc. Verizon Investments Inc. is a wholly owned subsidiary of Verizon Communications Inc., a publicly held corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company has a ten-percent or greater interest in it.

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Appendix B — Transcript Of September 16, 2003 Oral Argument At The United States Court Of Appeals For The District Of Columbia Circuit 3a

Verizon Internet Services Inc. ("Verizon") respectfully submits this conditional cross-petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. If this Court grants the Recording Industry Association of America, Inc.'s ("RIAA's") petition for certiorari to address the issue of statutory construction presented therein, Verizon respectfully submits that the Court should also grant this conditional cross-petition, which raises substantial questions under Article III and separation of powers principles that go directly to the enforceability of the novel subpoena provision of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), as interpreted and applied by RIAA and the district court. These issues were properly raised in both courts below and ruled upon by the district court. Pet. 2a & n.1, 59a-75a.[1]

As the district court's lengthy second opinion in these consolidated cases exemplifies, Pet. 55a-111a, any ruling that the subpoena provision contained in 17 U.S.C. § 512(h) applies to Internet service providers engaged in pure transmission or "conduit functions" would necessitate a further examination of whether this "novel provision," Pet. 22a, violates Article III and separation of powers principles by purporting to compel a federal court to issue and enforce a writ of subpoena in the absence of any underlying case or controversy. To Verizon's knowledge, the Article III issue has been raised in every pending case where RIAA has attempted to apply the DMCA subpoena provision to peer-to-peer communications.[2] Thus, the very uniformity and

1. Throughout this cross-petition, Verizon refers to the petition for certiorari filed by RIAA and docketed as No. 03-1579 as "Pet." and to this cross-petition as "Cross-Pet." Verizon refers to its opposition to RIAA's petition, which Verizon is filing concurrently with this conditional cross-petition, as "Opp."

2. *RIAA v. Charter Communications, Inc.*, No. 03-3802 (8th Cir.) (pending); *In re Subpoena to Univ. of N.C.*, No. 1:03mc138 (M.D.N.C.) (pending); *In re Subpoena to N.C. State Univ.*, No. 1:03mc139 (M.D.N.C.) (pending); *Pac. Bell Internet Servs. v. RIAA*, No. 03-CV-3560-JL (N.D. Cal.) (dismissed in part and transferred in part to D.D.C.).

nationwide certainty for which RIAA pleads in its own petition, Pet. 27-29, strongly counsels in favor of granting Verizon's conditional cross-petition if the Court decides to devote its limited resources to these subpoena enforcement proceedings.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 351 F.3d 1229 (D.C. Cir. 2003) and is reprinted in RIAA's petition for certiorari. Pet. 1a-17a. That court's order denying RIAA's petition for rehearing is reprinted at Pet. 112a, and its order denying RIAA's petition for rehearing en banc is reprinted at Pet. 113a. The opinions of the United States District Court for the District of Columbia are reported at 240 F. Supp. 2d 24 (D.D.C. 2003) and 257 F. Supp. 2d 244 (D.D.C. 2003), and are reprinted at Pet. 18a-54a and 55a-111a, respectively.

JURISDICTION

Cross-petitioner respectfully submits that the United States District Court for the District of Columbia lacked jurisdiction to issue or enforce the underlying subpoenas in these miscellaneous proceedings because there was no live case or controversy within the meaning of Article III at the time of either their issuance or enforcement. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 172-74 (1989). Cross-petitioner also respectfully submits that the assignment of purely investigative, non-judicial duties to both inferior officers of the Judicial Branch and Article III judges violates established separation of powers principles. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("[T]he Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

Cross-petitioner does not, however, contest the jurisdiction of the court of appeals or this Court to examine the constitutional questions whether these subpoenas were issued and enforced in violation of the "case or controversy" requirement of Article III or principles of separation of powers that this Court has found inherent in the tripartite structure of the national sovereign. Pet. 2a n.1, 60a n.6; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). At the very least, this Court has jurisdiction to determine whether the district court had jurisdiction to conduct any subpoena enforcement proceedings, as this Court always has jurisdiction to examine its own jurisdiction and the jurisdiction of the courts below. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The D.C. Circuit issued its decision on December 19, 2003. It summarily denied RIAA's timely petition for rehearing or rehearing en banc on February 24, 2004 without any member of the D.C. Circuit calling for a response. Pet. 112a, 113a. Cross-petitioner Verizon files this petition under Rule 12.5 as a cross-petition conditioned on this Court's granting the petition filed by RIAA (No. 03-1579), docketed on May 26, 2004. This Court has jurisdiction over both RIAA's petition for certiorari and Verizon's conditional cross-petition pursuant to 28 U.S.C. § 1254(1).[3]

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3. Verizon has filed an opposition to RIAA's petition and strongly believes, for the reasons given therein, that this Court's review is wholly unwarranted. Verizon presents this conditional cross-petition out of an abundance of caution to ensure that, *if* the Court should find sufficient reason to grant RIAA's primary petition, the Court will have all of the statutory and constitutional issues presented by these consolidated cases properly before it. *See* Robert L. Stern, *et al.*, Supreme Court Practice 443-49 (8th ed. 2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves Article III of the U.S. Constitution, reprinted herein at Cross-Pet. 1a-2a, and the subpoena provision of the DMCA, 17 U.S.C. § 512(h), reprinted in Verizon's Opp. at 45a-47a.

STATEMENT OF THE CASE

As the district court itself acknowledged, the subpoena procedure contained in the DMCA is an "innovation." Pet. 60a. It purports to authorize a private party to employ the coercive power of the federal courts to discover the identities of individuals engaging in anonymous communications over the Internet without placing any issue of federal law before the court or seeking any recognized form of judicial relief through the court's adjudication of an actual case or controversy between adverse parties. Rather, the subpoena provision attempts to use the court and its coercive power as an investigative tool to further the business interests of a private party. This is an unwarranted and fundamental departure from constitutional principles and historical practice. If the district court's application of the subpoena provision is allowed to stand, it will intrude upon judicial control of inferior judicial officers and sanction the assignment of myriad non-adjudicative tasks to both Article III judges and their clerks.

A. The Importance of Anonymous Speech and Association to the Growth of the Internet.

The value of the Internet as a forum for the free exchange of ideas and information cannot be overstated. Congress has expressly found that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). In fact, this Court found as early as 1997 that "it is no exaggeration to conclude that the content on the Internet is as

diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 852 (1997). It is for this reason that Congress consistently has sought "to promote the continued development of the Internet and other interactive computer services" "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(1)-(2), and to "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand," S. Rep. No. 105-190, at 8 (1998) (DMCA conference report).

Not only does the Internet enable millions of users worldwide to communicate with one another, almost instantaneously, concerning every political, cultural, and religious topic imaginable, but it enables Internet users to speak and associate anonymously in a borderless forum. It is this "ability of individual users to log onto the Internet anonymously, undeterred by traditional social and legal restraints, [that] tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society." *Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001).

It is a legal fact of life that virtually any new medium for the organization and dissemination of information in a wide variety of formats not only will be used as a forum for legitimate and fully protected expressive activity, but will also be misused by some to purloin the expression of others in violation of our copyright laws. The Internet in general, and new peer-to-peer file sharing applications in particular, are no exception to this general proposition.

There is no question that, while peer-to-peer file sharing applications have a host of perfectly licit uses, *see generally MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-36 (C.D. Cal. 2003) (noting substantial non-infringing uses for peer-to-peer software), *appeal pending*, No. 03-55894 (9th Cir.), a number of peer-to-peer users engage in the unauthorized exchange or offering for download of copyrighted sound

recordings. The same anonymity that has promoted the unfettered exchange of ideas since the Founding of the Republic, *Talley v. California*, 362 U.S. 60, 65 (1960), and has served as a protective umbrella for unpopular causes and associations, *NAACP v. Alabama*, 357 U.S. 449, 461 (1958), can be abused to make the detection and punishment of civil wrongdoing more difficult.

When an individual uses the Internet to communicate with others by email, browse pages on the World Wide Web, or participate in a virtual "chat room" with other Internet users, an Internet Protocol ("IP") address is used to route the communication to and from the user. As a user sends or receives email or visits various websites, his or her IP address becomes available to others. The disclosure of an IP address is not in and of itself a threat to the privacy, expressive, or associational rights of the Internet user because, unlike telephone numbers, *there is no publicly available directory that associates IP addresses with particular Internet users*. In fact, most reputable websites adhere to privacy and security policies that preclude the use of IP addresses to identify particular individuals or associate them with specific content that they have sent or received over the Internet.[4]

Only an individual's Internet service provider has access to the records that can match a particular IP address with a particular computer and a particular subscriber. Thus, only a service provider can supply the necessary information to

4. For example, this Court's own website contains a "Proprietary and Security Notice," which provides in pertinent part that:

> The Supreme Court will collect no personal information about visitors to this Website. The only information provided to the Court by GPO is the visitor's domain and Internet Protocol address, the type of browser and operating system used to access the site, the files visited and the time spent in each file, and the time and date of the visit.

See http://www.supremecourtus.gov/security.html (visited June 21, 2004).

someone who seeks to associate a subscriber with content sent, received, or viewed over the Internet. There are, however, publicly available databases that enable any member of the public to match a particular IP address to a particular Internet service provider. Thus, a copyright owner or its representative can identify the service provider that "owns" an IP address, and that service provider itself can match the IP address to an individual subscriber's account.

The problem for copyright owners—or anyone else interested in uncovering personal information about individual Internet users—is how to obtain this otherwise confidential information from the service provider. The same legal dilemma is faced by anyone, whether his or her motives are good or bad, who seeks information to identify an otherwise anonymous Internet user.

B. The Traditional "John Doe" Lawsuit

The problem of how to identify an anonymous or pseudonymous person in order to seek legal redress against him or her did not arise with the recent advent of peer-to-peer software or even with the emergence of the Internet itself. Rather, it is as old as the common law itself, as is the tried and true judicial solution—the "John Doe" lawsuit. In a traditional John Doe lawsuit, the plaintiff files a lawsuit, complete with the factual and legal allegations necessary to state a claim against the unknown or anonymous defendant, and thus invokes the court's authority to resolve a live case or controversy. In that context, the plaintiff then petitions the court for permission to conduct court-supervised discovery to ascertain the identity of the defendant, not to obtain information for extra-judicial purposes but to permit the plaintiff to prosecute the lawsuit that has been presented to the court.

The John Doe lawsuit has a long history at English common law dating back to 1630 and has survived the test of time in

American courts from the Founding of the Republic to today.[5] Indeed, this legal tool has been relied on by every conceivable type of plaintiff in a wide variety of causes of action, including suits by Internet service providers against spammers who subscribe to other providers' services, suits by private individuals against alleged defamers, and suits by copyright owners against alleged infringers.[6] In fact, since the D.C. Circuit's opinion in

5. One of the earliest mentions of "J. Doo" dates to 1630, in the third edition of *The Attorney's Academy* by Thomas Powell. *See* Frank W. Grinnel, *John Doe and Richard Roe – Their Portraits, Their History, Their Services in the Advancement of Justice Through the Rulemaking Power of the Courts*, Mass. L.Q., Aug. 1935, at 26, 27. At and even before the time of the Framing, "John Doe" was most often used as the fictitious lessee in an action for ejectment. *See, e.g., Doe v. Myjil*, 2 Va. Colonial Dec. B161, 1735 WL 1 (Va. Gen. Ct. Oct. 1735). "John Doe" also has a long pedigree as a mechanism for the identification of otherwise unknown defendants. *See, e.g., Irving v. Carpentier*, 11 P. 391, 392 (Cal. 1886); *Stearns v. Doe*, 78 Mass. 482 (1859). Today, the John Doe lawsuit is available to identify otherwise unknown defendants in almost every state court system in the Union and the federal courts. *See, e.g.*, Ala. R. Civ. P. 9(h); Ariz. R. Civ. P. 10(f); Haw. R. Civ. P . 17(d); Idaho R. Civ. P. 10(a)(4); Ind. R. Trial P. 17(F); Minn. R. Civ. P. 9.08; Miss. R. Civ. P. 9(h); Nev. R. Civ. P. 10(a); N.D.R. Civ. P. 9(h); Ohio R. Civ. P. 15(D); Or. R. Civ. P. 20(H); P.R.R. Civ. P. 15.4; S.C.R. Civ. P. 10(a)(1); S.D.R. Civ. P. 15-6-9(h); Utah R. Civ. P. 9(a)(2); Wash. Super. Ct. R. Civ. P . 10(a)(2); Wyo. R. Civ. P. 17(d).

6. *See, e.g., AOL v. John Does 1-30*, No. 03-472-A (E.D. Va. filed Apr. 14, 2003) (using John Doe procedure to identify senders of unsolicited bulk email); *Microsoft Corp. v. Does 1-50*, No. C04-0516C (W.D. Wash. Apr. 20, 2004) (same); *La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV030197400S, 2003 Conn. Super. LEXIS 3302 (Dec. 2) (using John Doe procedure to identify Internet user who sent allegedly defamatory email under a fictitious name); *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001) (using John Doe procedure to identify anonymous Internet users who posted messages that allegedly contained Plaintiff's confidential and proprietary information); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (2000), *rev'd on other grounds*,

(Cont'd)

this case issued in December 2003, the recording industry itself has filed "John Doe" lawsuits against more than 3,000 alleged infringers, in well over a dozen district courts across the country.[7]

C. The DMCA's Novel Subpoena Provision

The DMCA subpoena provision could not be more foreign to our common law traditions and the established boundaries of the "case or controversy" requirement of Article III. In fact, in RIAA's view, the more "streamlined" and "ministerial" the procedure for obtaining access to the compulsory power of the Article III courts, the better. Pet. 28 (decrying "cumbersome procedure" of John Doe suits, in which a complaint must be filed and "[c]opyright owners must obtain court permission before seeking prompt discovery").

Section 512(h) purports to do away with judicial supervision and the normal adversarial process in favor of a formulaic *ex parte* statement filed with the clerk of the court. *Id.* § 512(h)(2)(A) (citing *id.* § 512(c)(3)(A)). That statement need recite only a subjective "good faith belief" that an unspecified exclusive right under the copyright laws has been violated. *Id.* § 512(c)(3)(A)(v). The statement can be filed by anyone claiming to act on a copyright holder's behalf,

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(Cont'd)

America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) (using John Doe procedure to seek identity of five anonymous Internet users who published defamatory statements and revealed confidential information in an Internet chat room).

7. *See, e.g., UMG Recordings, et al. v. John Does 1-199*, No. 04-093 (D.D.C. Mar. 10, 2004) (record industry plaintiffs' motion for expedited discovery granted); *Capitol Records, Inc., et al. v. Does 1-250*, No. 1:04cv472 (S.D.N.Y. Feb. 26, 2004) (same); *Virgin Records, et al. v. Does*, No. 1:04cv438 (N.D. Ga. Mar. 3, 2004) (same); *Maverick Record Co., et al v. Does 1-12*, No. 1:04cv546 (D. Colo. Apr. 8, 2004) (same); *Lava Records, LLC, et al. v. Does 1-55*, No. 1:04cv484 (E.D. Va. May 7, 2004) (same).

id. § 512(h)(1), and there is no mechanism for even the most rudimentary verification of the bona fides of the requester.[8] The statements in the application need not state any cause of action, and need not be supported with the kind of due diligence and factual investigation required to file a complaint under Federal Rule of Civil Procedure 11. *See Rossi v. Motion Picture Ass'n of Am.*, No. Civ. 02-00239, 2003 U.S. Dist. LEXIS 12864, at *8-*9 (D. Haw. Apr. 29) (no factual investigation required to support "good faith belief" of infringement under subsection (c)(3)(A)(iii)).[9]

Finally, the subpoena requester does not place *any* issue of federal law before the district court for resolution. Indeed, the requester is not even required to aver any intention to bring an infringement action against the Internet user. Section 512(h) thus takes a judicial investigative tool that is proper when used in the context of an actual case or controversy (the third-party subpoena) and disconnects it from its only constitutionally sanctioned use—the development of facts to aid in the resolution of a live controversy of federal law between adverse parties.

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8. By contrast, an action for infringement of copyright can be brought only be the owner of the exclusive rights. 17 U.S.C. § 501(b); *see, e.g., Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) (affirming the district court's dismissal of infringement action because plaintiff licensee did not possess exclusive rights and therefore lacked standing).

9. An actual suit for infringement requires specification of the exclusive rights of the copyright owner that allegedly have been violated, *see* 17 U.S.C. § 106, as well as proof of registration of the copyright with the U.S. Copyright Office, 17 U.S.C. § 411; 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.09[A] (2004) ("[A]n allegation of compliance with the statutory registration and deposit requirements is jurisdictionally required, so that a motion to dismiss will be granted absent such an allegation." (footnotes omitted)). Section 512(h) incorporates neither requirement.

D. The Subpoenas at Issue in These Consolidated Enforcement Proceedings

RIAA obtained from the clerk of the district court, and served upon Verizon, two separate subpoenas purporting to invoke the authority of Section 512(h). These subpoenas directed Verizon, under pain of contempt, to disclose to RIAA the names, addresses, and telephone numbers of two otherwise anonymous users of Verizon's Internet access service. These subpoenas were issued in the name of the U.S. District Court, signed by the clerk of that court, and carried with them the threat of judicial enforcement in the face of inaction or resistance. *See, e.g.*, Fed. R. Civ. P. 45(e).

At the time RIAA requested, and the district court issued, the subpoenas at issue, RIAA had not filed a complaint seeking adjudication of any federal cause of action against anyone. Nor had it requested any recognized form of judicial relief. Nor did RIAA aver that it had any intention of filing such a lawsuit, as evidenced by its insistence throughout this litigation that it need not file, or state an intention to file, a federal lawsuit in order to obtain a DMCA subpoena. Pet. 18-19, 27-29.

E. The Proceedings Below

1. The District Court's Decisions

Verizon refused to comply with the subpoenas and did not reveal its subscribers' personal identifying information to RIAA. In the first proceeding in the district court, RIAA filed a motion to enforce the subpoena, and Verizon objected on the ground that Section 512(h) did not apply where a service provider performs a mere transmission or "conduit" function. Verizon also argued that the truncated procedure for issuance and enforcement of the subpoena raised serious constitutional questions under both Article III and the First Amendment. Pet. 49a-54a.

The district court adopted RIAA's statutory position in the first proceeding. Pet. 26a-44a. As relevant here, the district court also dismissed the Article III contention in a footnote. *Id.* at 53a n.21. The district court accurately described the Article III problem—that "the subsection (h) subpoena power" violates "Article III of the Constitution [because] there must be a 'case or controversy' before the Court to provide jurisdiction to issue a subpoena," *id.* It nonetheless responded to this argument with a non sequitur by stating that the reference to the Federal Rules of Civil Procedure in subsection (h)(6) provides "protection" to service providers. The district court did not explain how this "protection," to the extent it applies to DMCA subpoenas, satisfies the "case or controversy" requirement of Article III.

In the second proceeding consolidated on appeal, Verizon filed a motion to quash the second DMCA subpoena primarily on the grounds that the subpoena provision violates the First Amendment, Article III's case or controversy requirement, and general principles of separation of powers. The district court denied Verizon's motion. Although the court recognized that a DMCA subpoena was not supported by any case or controversy at the time of its issuance, it reasoned that because the act was, in its view, "ministerial" it did not involve an exercise of Article III power at all. *Id.* at 61a-62a, 74a n.12. Alternatively, the district court ruled that if the issuance and enforcement of the subpoenas was a judicial act, its constitutionality was supported by analogy to various statutes involving enforcement of administrative process and Federal Rule of Civil Procedure 27. *Id.* at 64a-73a.

While the district court upheld the application of the DMCA subpoena provision outside of a pending case or controversy on these two alternative grounds, it rejected a third ground advanced by both RIAA and the United States (before both the district court and later the D.C. Circuit)—that "a case or controversy sufficient to provide a jurisdictional basis for the issuance of a subpoena inheres in the dispute between the copyright holder and the service provider over disclosing the

alleged infringer's name." *Id.* at 74a n.12. The court stated that, because "at the time of issuance, a § 512(h) subpoena will not necessarily be tethered to a present or even anticipated adversary proceeding, involving a real, not a hypothetical, controversy' over providing the name," Section 512(h) is "not, as RIAA and the United States contend, analogous to 29 U.S.C. § 1132(c)(1), which allows an ERISA beneficiary to bring a civil action against a plan administrator for information only after the administrator has failed or refused to comply with a request for the information." Pet. 74a n.12.

2. The Court of Appeals' Reversal of the District Court on Statutory Grounds

The D.C. Circuit reversed the district court's decisions and ordered the lower court to vacate its order granting RIAA's motion to enforce in the first proceeding and to grant Verizon's motion to quash in the second one. *Id.* at 17a. As recounted in Verizon's opposition, Opp. 11-13, the court of appeals found after thorough examination of the text, structure, history, and purpose of Section 512 in general, and the subpoena provision in particular, that "§ 512(h) does not authorize the issuance of a subpoena to an [Internet service provider] acting solely as a conduit for communications the content of which is determined by others." Pet. 2a. Because the appellate court decided both of the consolidated appeals in Verizon's favor on statutory grounds, the court did "not reach either of Verizon's constitutional arguments." Pet. 2a & n.1.

In a footnote, the D.C. Circuit explained that "[t]he district court's jurisdiction to issue the *orders* here under review is not drawn into question by Verizon's Article III argument." *Id.* (emphasis added) (citing *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 476-78 (1894) ("application of ICC to enforce subpoena issued by agency in furtherance of investigation presents 'case or controversy' subject to judicial resolution")). That is, the D.C. Circuit apparently believed that,

notwithstanding Verizon's jurisdictional argument calling into question the district court's authority to *issue* the subpoenas, the controversy over whether it could in fact *enforce* such subpoenas itself conferred Article III jurisdiction on the district court. Thus, under the D.C. Circuit's reasoning, the district court (or the court of appeals on review) could resolve the question whether the subpoenas should be enforced on any ground—refusing to enforce the subpoenas either because the district court lacked statutory authority to issue them or because it lacked authority under Article III to enforce them.

This observation regarding Article III was the D.C. Circuit's response to full briefing of the issue by all parties on appeal and amplification of the issue at oral argument. *See, e.g.*, Hearing Transcript, attached hereto at Cross-Pet. 6a-9a (Judge Williams making the distinction between jurisdiction to issue and jurisdiction to enforce the subpoenas); *id.* at 36a (same); *id.* at 34a-35a (Judge Ginsburg inquiring why the United States "address[ed] only one of the . . . Article III objections that's been raised" and did not "respond to the objection raised, the separation of powers objection"); *id.* at 37a-38a. The D.C. Circuit concluded that it could reverse the district court's orders on statutory grounds and confirmed that the district court's inability to issue or enforce the subpoenas under Article III was an alternative ground that could support a judgment for Verizon and that was properly raised and presented below.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. If This Court Grants RIAA's Petition, It Should Also Consider The Alternative Article III Ground For Affirmance Of The D.C. Circuit's Judgment Below.

A. Issuance of the DMCA's Novel Subpoena Device Outside of a Pending Case or Controversy Violates Article III and Conflicts with this Court's Precedent.

Article III, section 2 of the Constitution expressly limits the exercise of federal judicial power to specifically enumerated "Cases" and "Controversies." Cross-Pet. 1a. A "case" in the constitutional sense has consistently been defined as "a suit instituted according to the regular course of judicial procedure." *Muskrat v. United States*, 219 U.S. 346, 356 (1911). From the earliest days of the Republic, this requirement has been understood to entail, at a minimum, an adversarial proceeding that involves at least two parties, a cause of action within the jurisdiction of the federal courts, and a prayer for judicial relief that is determinative of some set of rights or obligations as between those parties. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171-72 (1803); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Yale Todd's Case*, *printed at* 54 U.S. (13 How.) 52 (1851); *Gordon v. United States*, 117 U.S. Appx. 697, 699-706 (1864); *Muskrat*, 219 U.S. at 353-63; *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950); *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989).

The issuance and enforcement of subpoenas are no exception to Article III's requirement that judicial acts must occur within the context of a case or controversy properly pending before a federal court. A subpoena is a form of *judicial process*—a tool to assist the court and the parties in the resolution

of an actual case or controversy. Thus, this Court repeatedly has made clear that "[t]he *judicial* subpoena power not only is subject to specific constitutional limitations . . . but also is subject to those *limitations inherent in the body that issues them* because of the provisions of the Judiciary Article of the Constitution." *Morton Salt*, 338 U.S. at 642 (emphases added). The Court reaffirmed this principle in *Catholic Conference*, holding that "if a district court does not have subject-matter jurisdiction over the underlying action, and the *process was not issued* in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed." 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642) (emphasis added); *see also Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (holding that a district court is "*without power to issue a subpoena* when the underlying action is not even asserted to be within federal-court jurisdiction" (emphasis added)); *accord Barwood, Inc. v. Dist. of Columbia*, 202 F.3d 290, 294-95 (D.C. Cir. 2000).

This Court reiterated these limits on the judicial power in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). The case involved a form of class action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, whereby a plaintiff is authorized to sue for damages and injunctive relief for age discrimination "on behalf of himself and other employees similarly situated," provided that individual employees consent to the representational suit. 493 U.S. at 167-68 (citing 29 U.S.C. § 216(b)). The Court held that the district courts "have discretion, in appropriate cases," to facilitate notice to potential plaintiffs in such a representational action. *Id.* at 169-70. Tellingly, the Court relied upon the existence of a pending Article III case or controversy in so holding: "*once an ADEA action is filed*, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the

task is accomplished in an efficient and proper way." *Id.* at 170-71 (emphasis added).[10]

Notably, the dissenting opinion of Justice Scalia, joined by the Chief Justice, *id.* at 174, maintained that *even in the context of a pending lawsuit*, the district court did not possess authority to involve itself in the discovery of, or notice to, potential additional plaintiffs. This "unheard-of role of midwifing" lawsuits yet to be filed, *id.* at 176-77, while quite properly assignable to an executive agency, could not be conferred upon an Article III court. In Justice Scalia's view, the notice and the discovery order entered by the district court were "void because of lack of authority to act for a purpose unrelated to adjudication of the case before it." *Id.* at 179.

As interpreted and applied by the district court, Section 512(h) surpasses the jurisdictional limits on Article III courts that have been established and adhered to from *Hayburn's Case* to *Hoffmann-La Roche*. Section 512(h) is the equivalent of the judicial "solicitation of claims" condemned by the majority in *Hoffmann-La Roche* as destructive of "judicial neutrality" by making the court an instrument of *ex parte* investigative applications. *Id.* at 174. The logic of both the majority and the dissent in *Hoffmann-La Roche* compels the conclusion that subpoenas issued outside of pending lawsuits are beyond judicial competence and undermine judicial independence.

That the district court improperly ignored these fundamental principles is clear on the face of its opinion in the second subpoena proceeding. The lower court recognized that "'[f]ederal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends.'" Pet. 60a.

10. Justice Kennedy's majority opinion carefully distinguished between actions taken in aid of existing jurisdiction and a judicial search for potential lawsuits. "Court intervention in the notice process for case management purposes is distinguishable *in form and function* from the solicitation of claims." 493 U.S. at 174 (emphasis added).

It further recognized that, "at the time of issuance, a § 512(h) subpoena will not necessarily be tethered to a present or even anticipated 'adversary proceeding, involving a real, not a hypothetical, controversy' over providing the name." *Id.* at 74a n.12 (citation omitted); *id.* at 100a ("To be sure, the clerk of the court is not commonly called upon to issue a subpoena in the absence of a pending case or controversy."). Thus, the lower court *conceded that no Article III case or controversy was present when the underlying DMCA subpoenas were issued*, but it nonetheless refused to apply the teachings of this Court in *Morton Salt* and *Catholic Conference*.

The district court, RIAA, and the United States have offered five separate (and conflicting) rationales for refusing to apply the holdings of the cases cited above to the novel subpoena power at issue here. Indeed, RIAA itself in its briefs before the D.C. Circuit refused to endorse the district court's primary rationale for rejecting Verizon's Article III challenge—namely, that the clerk's issuance of a DMCA subpoena is a permissible "ministerial" duty; the United States simply accepted without question that the clerk's issuance of a DMCA subpoena *is* a judicial act and asserted that the mere *possibility* that the copyright owner could bring an infringement action in the future was sufficient to confer jurisdiction on the court; and both RIAA and the United States asserted that there exists a current case or controversy between the copyright representative and the service provider at the time the subpoena is issued, a position forcefully rejected in a footnote by the district court. Pet. 74a n.12. It is not surprising, then, that none of these rationales is independently satisfying or persuasive, and some actually raise more separation of powers questions than they resolve.

1. In order to reach the conclusion that Section 512(h) is constitutional, the district court endorsed the extraordinary position that "the clerk's issuance of a § 512(h) subpoena does not involve either the exercise of judicial power or the exercise by federal judges of Article I or Article II-type investigatory

power." Pet. 61a. Based upon its belief that the issuance of a Section 512(h) subpoena is "a quintessentially ministerial duty," *id.*, the district court apparently concluded that it does not involve the exercise of the constitutional power of *any* branch of government.

This transparent attempt to side-step well-established limitations on the judicial power flies in the face of this Court's precedent. The two subpoenas here were issued *in the name of the district court* and carried with them *on the day of their issuance* the enforcement authority that federal courts derive only from Article III of the Constitution.[11] No doubt the subpoenas at issue in *Catholic Conference* and *Houston Business Journal* were processed by clerks of the federal courts—but their *issuance* outside a case or controversy rendered them void and unenforceable by an Article III court. Under the district court's flawed reasoning, as long as a clerk initiates the process—regardless of whether the clerk is employed by the district court, a court of appeals, or *this* Court—Article III courts can be pulled into a myriad of purely investigative duties that are clearly forbidden to them by the Constitution.

2. In some tension with its primary holding, the district court also apparently endorsed the argument that the clerk of the court exercises legislative authority delegated pursuant to Article I of the Constitution in issuing DMCA subpoenas. Pet. 63a. In the court's view, the fact that Section 512(h) was statutorily authorized served to distinguish *Catholic Conference* because, in that case, "the only conceivable source for the district court's jurisdiction to issue a subpoena was a pending case or controversy." Pet. 70a. In essence, the district court held that Congress had by statute supplanted the need for a case or controversy.

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11. *See, e.g.*, Advisory Committee Notes to Fed. R. Civ. P. 45 (1937) ("This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts."); *In re Simon*, 297 F. 942, 944 (2d Cir. 1924) ("The fact that a writ of subpoena is actually signed in writing by the clerk of the court . . . makes it none the less the court's order.").

This argument simply underscores the constitutional violation. This Court has repeatedly made clear that the case or controversy requirement is a *per se* rule; it cannot be relaxed or modified by Congress. Thus, in *Hayburn's Case*, five of the six Justices of this Court, sitting as Circuit Judges, concluded that a law that assigned to federal judges the role of taking pension applications and making recommendations to the Secretary of War improperly imposed duties "not of a judicial nature." 2 U.S. at 410-14. Chief Justice Marshall alluded to the results in those circuit cases with favor in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and further noted that Congress had quickly repealed the 1792 law that assigned *ex parte* investigative duties to Article III judges. *Id.* at 171-72.

Similarly, in *Ferreira*, this Court struck down a law that assigned to district court judges in Florida the adjustment of claims by Spanish inhabitants under a treaty. 54 U.S. 40. The Court found that the role prescribed by statute was not judicial in nature:

> For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there . . . .

Id. at 46-47; *accord Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) (Harlan, J.) (reaffirming the "salutary doctrine that Congress . . . may not impose upon the courts of the United States any duties not strictly judicial").

These principles were expressly reaffirmed by this Court in *Morton Salt* and *Catholic Conference*—in the very context of the power of the federal courts to issue writs of subpoena. In *Morton Salt* the Court found: "The *judicial subpoena power* not only is subject to specific constitutional limitations, which also apply to administrative orders, . . . but *also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.*" 338 U.S. at 641-42 (emphases added). In *Catholic Conference*, the Court cited favorably to *Morton Salt* in support of its holding that a subpoena issued in the absence of subject matter jurisdiction is void. 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642). Both *Morton Salt* and *Catholic Conference* make clear that the limitations of Article III are analogous to those contained in the Bill of Rights, that they apply to the issuance of subpoenas, and that they cannot be relaxed or modified by statute.

The lower court's "statutory authority" holding is also directly contrary to this Court's Article III precedent on standing. Although the lower court recognized that there was no live controversy at the time these subpoenas were issued, it found that the statute solved this constitutional dilemma. But Congress is not free to alter the requirement that binding judicial action can occur only in the context of live, adversarial proceedings regarding a claim within the subject matter jurisdiction of a federal court. The requirement of Article III standing is "absolute" and not "malleable by Congress." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996); *accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, 577 (1992); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Beyond the *per se* violation of the requirements of Article III, legislative co-opting of federal judicial clerks for non-judicial duties raises a host of *additional* separation of powers concerns. The clerk of court is an inferior officer of the Judicial Branch, who derives all of his or her authority from

appointment by an Article III judge. 28 U.S.C. § 956; *see also Buckley v. Valeo*, 424 U.S. 1, 126 (1976). By definition, the derivative authority of an inferior officer generally cannot exceed the authority of the appointing officer. *See, e.g., Lloyd v. Lawrence*, 60 F.R.D. 116, 118 (S.D. Tex. 1973) ("Obviously, the Clerk may not take action which the Court itself may not take."). Thus, it is difficult to see how the clerk can be authorized to take action that an Article III judge could not take, particularly where the action is taken in the name of the court and requires the exercise of the court's enforcement authority to have any effect.

The assignment of extra-judicial duties to an inferior judicial officer is, in itself, an intrusion into the powers and organization of the Judicial Branch and would necessarily lead to bizarre consequences. The court could be forced to review clerk's actions for an abuse of discretion or clear error when those actions are authorized by Article I as opposed to Article III. The clerk's office would have to decide whether to give priority to the investigative work assigned to it by Congress over the adjudicative work assigned to it by Article III judges. Under the district court's reasoning, Congress could use any of its Article I, section 8 powers to assign myriad investigative and non-judicial tasks to the clerk of any federal court (including this one) and then use Article III judges to enforce those investigative demands. *Cheney v. United States Dist. Ct. for the Dist. of Columbia*, slip op. at 12, No. 03-475 (U.S. June 24, 2004) ("We have recognized that [e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." (citations and internal quotation marks omitted)).

The district court itself recognized the concern that DMCA subpoenas would divert the resources of inferior judicial officers from the work of the courts, but found that to date "no such barrage of requests has occurred." Pet. 73a. Yet in the period between when the district court penned those

words and when the D.C. Circuit reversed the district court on statutory grounds, the district court was flooded with more than 4,000 DMCA subpoena requests, such that a spokesperson for the Administrative Office of the U.S. Courts described the clerk's office as "functioning more like a clearing house, issuing subpoenas for all over the country." *RIAA nearing 1,000 subpoenas against file-sharing suspects*, Pioneer Press (July 18, 2003), *at* http://www.twincities.com/mld/pioneerpress/business/technology/6335275.htm?1c (visited June 23, 2004). In fact, the DMCA subpoenas were "so prolific that the" district court, "already suffering staff shortages, [was] forced to reassign employees from elsewhere in the clerk's office to help process paperwork." *Id.*

3. The district court also attempted to justify its conclusion that Section 512(h) conformed with Article III's case or controversy requirement by opining that in a "real-world sense," an Article III judge does not take action until a dispute arises over enforcement of the subpoena, "at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution." Pet. 63a. The suggestion, however, that subsequent litigation can supply the necessary "case or controversy" for purposes of Article III, *id.*, puts the subpoena cart before the jurisdictional horse. The jurisdiction necessary to issue the subpoena cannot be created by an after-the-fact dispute. "A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *In re Marc Rich & Co.*, 707 F.2d 663, 669 (2d Cir. 1983). Both *Catholic Conference* and *Houston Business Journal* make this clear: the subsequent dispute over the legality of the subpoenas could not create the requisite federal case or controversy to support their issuance. *See also Barwood*, 202 F.3d at 294-95 (rejecting argument that violation of a temporary restraining order could supply federal jurisdiction as "a remarkable feat of bootstrapping");

McCook Metals LLC v. Alcoa, 249 F.3d 330, 334 (4th Cir. 2001) (noting that Fed. R. Civ. P. 37 & 45 "do not confer subject matter jurisdiction upon the [federal] courts"); Fed. R. Civ. P. 82.

4. The lower court also opined that, "assuming that the issuance of a § 512(h) subpoena can be conceptualized as a judicial act," Pet. 64a, it was nonetheless constitutional by analogy to other statutes. The lower court proceeded to cite four federal statutes *seriatim*, without analysis, for the proposition that "§ 512(h) is by no means as unique as Verizon claims." *Id.* Nowhere, however, was the lower court willing to say that any of these statutes authorized the issuance and enforcement of purely investigative judicial process, because they do not. The statutes relied upon by the lower court are clearly distinguishable as they: (1) involve the issuance of subpoenas that are not enforceable by Article III courts, 2 U.S.C. § 338; (2) involve an underlying case or controversy regarding independent issues of federal law pending before a federal agency, 35 U.S.C. § 24 ("testimony . . . to be taken for use in any contested case in the Patent and Trademark Office"); 7 U.S.C. § 2354(a) (same for Plant Variety Protection Office); *see Sheehan v. Doyle*, 513 F.2d 895, 897-98 (1st Cir. 1975); or (3) permit a clerk to issue a subpoena during a contested arbitration involving federal labor matters where the award itself is subject to judicial enforcement, 45 U.S.C. § 157(h). None of these statutes places the clerk and the court in the role of the initial investigator of facts that may or may not be useful in the potential civil claims of private parties.

5. Finally, the lower court reached for Federal Rule of Civil Procedure 27 as a "compelling precedent for judicial compulsion of information outside the context of a pending case or controversy." Pet. 70a. The district court recognized that there were differences between Rule 27 and Section 512(h), *id.* at 68a-69a, but sought to characterize those

differences as "neither as substantial nor consequential as Verizon contends," *id.* at 68a. The lower court ignored, however, that there are at least four fundamental differences, of constitutional dimension, that separate Rule 27 proceedings from the subpoena at issue here.

First, a Rule 27 petition must state under oath an unequivocal intention to bring a lawsuit in federal court. Fed. R. Civ. P. 27(a)(1); *In re Skylight Shipping Corp.*, No. 99-1290, 1999 WL 1293472, at *2 (E.D. La. July 9) ("[T]he rule is clear by its terms that the petitioner must demonstrate that it expects to be a party to such an action and that it is presently unable to bring it or cause it to be brought. 'The allegation that the petitioner expects to be a party to an action must be *unequivocal*. . . .'" (citation omitted)); 8 Charles A. Wright, *et al.*, Federal Practice and Procedure § 2072 (3d ed. 1998) (same). The lower court recognized that this was not the case in the context of a Section 512(h) subpoena. Pet. 68a-69a ("an entity seeking a subpoena under § 512(h) need not state that it expects to be a party to an action cognizable in federal court"). And, RIAA repeatedly stated below that it was interested only in *contacting* the subscribers at issue, not necessarily in *suing* them.[12]

Second, Rule 27 is not a discovery tool, *see Penn. Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) ("A Rule 27(a) deposition 'may not be used as a substitute for discovery.'"); rather, it authorizes the perpetuation of known evidence in the face of an averment

12. *See, e.g.*, Jonathan Krim, *A Story of Piracy and Privacy*, Wash. Post, Sept. 5, 2002, at E1 ("RIAA simply wants to warn the subscriber that he or she is violating the law."); *Verizon, Music Industry Argue Over Internet Privacy*, Bloomberg News (Oct. 4, 2002) (Cary Sherman, President of RIAA, stating: "It is a procedural burden to have to file litigation against people just to find out who they are, especially when you might have been able to achieve the same result with just a warning notice.").

as to its imminent loss. Thus, the petitioner must put forward "the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it." Fed. R. Civ. P. 27(a)(1), 27(a)(3) (the court must be "satisfied that the perpetuation of the testimony may prevent a failure or delay of justice"); *see Ash v. Cort*, 512 F.2d 909, 911 (3d Cir. 1975) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost."). Again, the lower court recognized that these subpoenas were not (and could not be) supported by such an averment of imminent loss. Pet. 69a.[13]

Third, Rule 27 requires notice to the potential adverse party (the defendant in the promised civil action) and the initiation of adversarial proceedings before any judicial process issues. The proceedings cannot be *ex parte*—the petitioner must notify each "expected adverse party," and if notice is impossible, the court must appoint a lawyer to represent their interests. Fed. R. Civ. P. 27(a)(2).[14] It is in essence a lawsuit for perpetuation of testimony, with all the elements of a case within the subject matter jurisdiction of the court pled in the petition. *See Arizona v. California*, 292 U.S. 341, 347-48 (1934) ("The sole purpose of such a *suit* is to perpetuate the testimony." (emphasis added)). By contrast, Section 512(h) does not require any notice to the real party in interest (the anonymous subscriber) and authorizes an

13. RIAA made no such averment of imminent loss in its subpoena request, and none is required by the statute. Moreover, such an averment would have been impossible in this case, for the undisputed record facts are that Verizon preserves the relevant data.

14. This was the rule regarding the equity antecedents to Rule 27 as well. *See, e.g., Green v. Campagnia Generale Italiana di Navigation*, 82 F. 490, 494 (S.D.N.Y. 1897) ("Counsel have not referred me to any authority, however, nor have I been able to find any, for proceeding in equity under any circumstances by mere *ex parte* petition to take depositions in *perpetuam rei memoriam*, without any bill filed, or process issued or served on the defendants in interest.").

ex parte issuance of binding judicial process. Notice to subscribers is impracticable in any event where RIAA or other copyright owners or their representatives request the issuance of thousands of subpoenas and demand "expeditious" compliance.

Finally, a suit to perpetuate testimony has roots in equity that predate the Constitution itself. By contrast, the issuance of an *ex parte* subpoena *duces tecum* to a third party to discover facts unconnected to any case or controversy has no common law or equity roots at all. It is, as the district court candidly conceded, an "innovation." Pet. 60a.

As interpreted and applied in these two subpoena actions, Section 512(h) purports to authorize a private party to bring to bear the full coercive power of the federal district court to investigate facts unconnected to any pending (or promised) case or controversy within the subject matter jurisdiction of the court. RIAA has consistently maintained that its primary use of this statute will not be to sue potential infringers, but rather to issue warnings to subscribers enunciating RIAA's legal position on the use of peer-to-peer software. The courts and their clerks are thus reduced to the role of a "private investigator," facilitating the business communications of a particular sector of the economy. This is not analogous to Rule 27 or any other accepted judicial device, and if it is upheld it will open the door to countless other non-judicial assignments for the Judicial Branch—at the district court, appellate, or Supreme Court level.

B. These Subpoena Matters Squarely Present the Important Question Whether the DMCA's Novel Subpoena Device Can Be Applied Outside of a Pending Case or Controversy.

Verizon believes that RIAA's petition should be denied for all of the reasons stated in Verizon's opposition. If the Court concludes that it should use its scarce resources to

resolve the statutory question presented by RIAA's petition, however, it should also grant Verizon's cross-petition in order to resolve the entire controversy surrounding use of the novel DMCA subpoena device to obtain the personal information of individual Internet users without filing a lawsuit and without any judicial supervision.

First, the Article III issue has been raised in every matter involving RIAA's attempt to use the DMCA to obtain the personal information of individual Internet users, *see*, *e.g.*, Pet. 53a, 59a-75a; *supra* n.2. Accordingly, this issue is as much a part of finally resolving whether RIAA can continue its DMCA subpoena campaign as is the statutory issue on which RIAA seeks certiorari. In other words, a ruling from this Court regarding the presence of statutory authority is meaningless for purposes of final resolution of the validity of RIAA's subpoenas without a decision on whether a statute can authorize a federal court to issue compulsory process to a private party outside the bounds of a case or controversy.

Second, the issue presented is a substantial one, calling into question the constitutional validity of an unprecedented investigative tool created by Congress to circumvent Article III's adversarial process and the traditional legal means for identifying otherwise anonymous individuals. The only judicial ruling on this issue, the second decision issued by the district court below, Pet. 55a-111a, conflicts in numerous respects with the decisions of this Court and principles recognized by individual members of this Court. *See supra* Part I.A.

Third, these subpoena matters squarely present this substantial constitutional issue. The issue was fully briefed before both the district court and the D.C. Circuit; the district court heard argument on this issue in two separate hearings and then addressed the issue in two separate decisions; and the D.C. Circuit acknowledged the significance of the issue

in the questions posed at oral argument and preserved it as a potential alternative ground for affirmance in its opinion, Pet. 2a n.1. Only this Court can definitively resolve the Article III issue.

The record on the Article III issue in the courts below is every bit as fully developed as the statutory issue presented by RIAA's primary petition. This Court has before it a lengthy district court discussion of the issue, and the Article III issue was fully briefed and extensively discussed at oral argument before the D.C. Circuit. *See* Cross-Pet. App. 3a-45a. Indeed, this Court has repeatedly confirmed that it will consider "*any* ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see, e.g., Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994).

Finally, the deleterious effects on the Judicial Branch and separation of powers that would ensue in the interim if this Court were to reverse the D.C. Circuit on the statutory issue but merely remand the constitutional issues for further review counsel in favor of resolving both the constitutional issues and the statutory issues simultaneously. As explained above, in the relatively brief period between the time the district court's enforcement orders became effective and the D.C. Circuit's reversal of those orders (a little over six months), RIAA alone sought and obtained approximately 4,000 subpoenas under the purported authority of the DMCA. These subpoena requests drained and diverted scarce Article III resources. *See supra* at pp. 22-23. Thus, this Court should, if it grants RIAA's petition, also grant this cross-petition to serve judicial economy and preserve the resources of the federal courts from the thousands and potentially tens of thousands of disputed DMCA subpoena enforcement proceedings that would surely be the result of a new RIAA DMCA subpoena spree.

C. This Court Should Consider the Article III and Separation of Powers Issues Regardless of Whether It Grants this Conditional Cross-Petition.

Verizon believes that this Court can and should consider the Article III and separation of powers issues as an alternative ground on which to affirm the D.C. Circuit's judgment—remanding the matters to the district court to vacate its order granting RIAA's motion to enforce the first subpoena and granting Verizon's motion to quash the second subpoena, Pet. 17a. Because of the remote possibility that a favorable ruling on the Article III issue could require a technical change in the D.C. Circuit's judgment (namely, dismissal of both motions without disposition), and because a ruling on the Article III issue would render Section 512(h) unconstitutional as applied to *any* function performed by service providers (arguably different or broader relief), Verizon respectfully submits this conditional cross-petition to ensure that, if the Court decides to hear this case for any reason, it will have the maximum flexibility in resolving all the statutory and constitutional issues litigated below. Alternatively, if the Court concludes that a cross-petition is unnecessary in these circumstances, it can and should include the Article III question in any order granting RIAA's petition for certiorari.

CONCLUSION

For the foregoing reasons, Verizon respectfully submits that if this Court grants RIAA's petition for certiorari in No. 03-1579, it should also grant this conditional cross-petition for a writ of certiorari in order to fully address the constitutional validity of the DMCA subpoena provision.

Respectfully submitted,

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June 25, 2004

APPENDIX

APPENDIX A

ARTICLE III OF THE UNITED STATES CONSTITUTION

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Appendix A

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX B

TRANSCRIPT OF SEPTEMBER 16, 2003 ORAL ARGUMENT AT THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 03-7015 & 03-7053

RECORDING INDUSTRY OF AMERICA, INC.,

Appellee,

v.

VERIZON INTERNET SERVICES INC.,

Appellant.

Tuesday, September 16, 2003

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE GINSBURG, CIRCUIT JUDGE ROBERTS, AND SENIOR CIRCUIT JUDGE WILLIAMS

Appendix B

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Appendix B

PROCEEDINGS

[7] THE CLERK: Stand, please. Oyez, oyez, oyez. All persons having business before the Honorable United States Court of Appeals for the District of Columbia Circuit are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court. Be seated, please.

Case number 03-7015, *et al.*, the Recording Industry Association of America, Inc., versus Verizon Internet Services, Inc., Appellant. Mr. McBride for Appellant, Mr. Verrilli for Appellee, Mr. McIntosh for Intervenor.

ORAL ARGUMENT OF ANDREW G. McBRIDE, ESQ. ON BEHALF OF THE APPELLANT VERIZON INTERNET SERVICES, INC.

Good morning, Your Honors. Andrew McBride on behalf of the Appellant, Verizon Internet Services.

Your Honors, these appeals are not just about RIAA, and [8] they are not just about peer-to-peer file sharing. Anytime anyone in this courtroom sends an e-mail or browses a website on the Internet or participates in a chat room, a numeric IP address is used to route that communication, and it becomes accessible to others. In fact, this Court's own website notes that it gathers the IP addresses of those who visit it and has a privacy policy for their protection. At the same time, whenever you browse a website or read an e-mail, your computer makes an electronic copy of that content you're reviewing, making you —

Appendix B

JUDGE ROBERTS: Mr. McBride, the case is about a fellow who made available 600 separate copyrighted works for sharing with others.

MR. McBRIDE: I think the case is about a good-faith allegation by an agent of a copyright owner that such occurred without being able to hear from the subscriber themselves, and I think the important point is that the procedures here do not allow the subscriber notice before their identity is taken away, and the entire structure of the subpoena provision is tied to a particular type of material, and that is material that resides on the service provider's [9] system. There are three separate cross-references —

JUDGE ROBERTS: But is there any legitimate purpose for making available for copying 600 copyrighted works?

MR. McBRIDE: Well, we don't know in fact how those works got on the computer. Our point is they could have been downloaded from CDs. Our point is that the statute was not intended to reach material that is located on your personal computer, and I think the key is (h)(4). (h)(4) says basis for issuance of subpoena, and it says that the subpoena to be effective has to be accompanied by a notice under Section (c)(3)(A) that satisfies the provisions of Section (c)(3)(A). That is the jurisdictional prerequisite for an issuance of a subpoena, and RIAA says that replaces the case or controversy. Certainly, a jurisdictional prerequisite to invoke the jurisdiction of the Court should be narrowly construed.

JUDGE WILLIAMS: I'm glad we're on jurisdiction now, because that's usually the first issue. In the second case, you moved to quash, right?

MR. McBRIDE: That's correct, Your Honor.

JUDGE WILLIAMS: Now, you weren't arguing that the [10] district court did not have jurisdiction to entertain that?

MR. McBRIDE: No, I think *Marbury* teaches us the Court always has jurisdiction to look at its jurisdiction.

JUDGE WILLIAMS: Well, its jurisdiction?

MR. McBRIDE: Its —

JUDGE WILLIAMS: I mean, aren't there, there are two separate activities here, one being the clerk issuing the subpoena, the other being the Court ruling on the motion to quash. Suppose the subpoena came from outer space, there were a motion in federal district court between the person who had sought the subpoena and the person subject to the subpoena. Is there a case of controversy problem there?

MR. McBRIDE. Well, I think the answer here is that the subpoena is issued by the clerk in the name of the Court.

JUDGE WILLIAMS: I understand that —

MR. McBRIDE: And carries the Court's enforcement authority with it the moment it is issued.

JUDGE WILLIAMS: Let's assume that the initial subpoena is just dreadful from every possible jurisdictional point. You invoke the jurisdiction of the district court to quash it, right?

[11] MR. McBRIDE: That's correct.

JUDGE WILLIAMS: And you aren't repudiating that invocation, right?

MR. McBRIDE: I am not in the sense that *Marbury* always allow the Court to consider its jurisdiction.

JUDGE WILLIAMS: Well, as we have — well, I think it's more than its jurisdiction. You keep aggregating the two different propositions, issuance of the subpoena and quashing the subpoena, that the motion to quash, which you've sought, which you filed, is something within the jurisdiction of the Court, right?

MR. McBRIDE: Well, I think it is in the sense —

JUDGE WILLIAMS: And it's the, I mean —

MR. McBRIDE: If I —

JUDGE WILLIAMS: You raise issues.

MR. McBRIDE: I raise —

JUDGE WILLIAMS: Article III issues, but you also raise statutory issues about the issuance of the subpoena.

MR. McBRIDE: That's correct, Your Honor.

JUDGE WILLIAMS: But if the district court had jurisdiction over the motion to quash, it can resolve that on [12] any ground that's suitable, right?

MR. McBRIDE: Well, I don't think I've conceded the jurisdiction even in my jurisdictional statement here, but I think I'm allowed to defend against the subpoena. I don't have to take the position of a contemner. I can come in and say there's no Article III authority, and I would point out, I think, Your Honor —

JUDGE WILLIAMS: You're saying there's no Article III authority to issue the subpoena, I understand that.

MR. McBRIDE: Or enforce the subpoena.

JUDGE WILLIAMS: Let's assume you're —

MR. McBRIDE: And a motion of —

JUDGE WILLIAMS: Let's assume you're right on that. But you are not saying, and it seems to me very hard for anyone to say, that there's no jurisdiction to entertain the motion to quash the subpoena.

MR. McBRIDE: That's correct, and I think that's right. That's just like *Marbury* entertaining whether or not the writ of mandamus lies and then entertaining the question of whether or not that would exceed the original jurisdiction of the Supreme Court or the appellate jurisdiction.

[13] JUDGE WILLIAMS: I don't think it's the same thing, because there you're talking about jurisdiction over the same act. Here, there are different acts. One is the issuance of the subpoena, the other is quashing the subpoena.

MR. McBRIDE: But I think our point for Article III is unlike any other scheme, here the subpoena is issued in the name of the Court and enforced in the name of the Court for the benefit of a private party, and the private party doesn't invoke the jurisdiction of the Court to say adjudicate an issue of federal of law for me, it says give me a piece of process on an ex parte basis. The evidence is then handed over to the private party for use as they see fit. It's not used in any adjudication of any issue of federal law.

I'd like to get back to the statute, if I could, for a moment, because I think the statute is jurisdictional. I think under *Steel* case, the Court could address the statute or Article III, because both of those go to the jurisdiction of the Court to issue or enforce the subpoena, and the (h)(4) provision, basis for issuance of subpoena, refers back to (c)(3)(A), and it says that the notice that's filed with the [14] Court and served on the service provider must satisfy the provisions of (c)(3)(A).

Now we look at (c)(3)(A). (c)(3)(A) says to be effective under this subsection, subsection (c), the notice must contain certain elements. One of those elements is that it must identify the material to be removed or access to which is to be disabled, and it must provide information sufficient to allow the service provider to find and examine the material, to locate the material, but —

JUDGE ROBERTS: Well, the service provider can disable access to the infringing material simply by terminating the infringer's account.

MR. McBRIDE: But Congress used very different language in different sections of the statute with different predicates for that. If you look at (j), the injunctive relief provision, it mentions terminating the account of a subscriber, disabling access, or removing material as a surgical device where the website is under the control of Verizon, as Verizon hosts a number of websites, unlike the laptops here, where Verizon cannot gain access to the individual subscriber's material on the A drive, which is [15] where this KaZaA material resides. Remove, Verizon could remove five infringing pictures from a large website, disable access to. Verizon could take, temporarily take the website off the Internet, and in the (g) provision, Congress made clear that that was a temporary measure. The service provider then gives notice to the person whose material has been taken down, and at that time there's a dialogue, and there can be a counter-notification and the material can be placed back. But the kind of material that's referenced in the take-down notice provision in (c)(3)(A) doesn't exist, and in the second section it talks about material at an online site, and I think that's a very inapt description of a personal computer. The legislative —

JUDGE GINSBURG: Mr. McBride, stay with your, just back up a sentence or so. Under your reading of this, it would seem, in which you're requiring very strict compliance, that is to say, with each of the elements in the notice, it would seem that if somebody posted copyrighted material to their website for a limited period of time and thereafter the company, the carrier receives a notification, but the material's already been removed, they would no longer be any [16] obligation to say who had posted it.

MR. McBRIDE: Well, I don't think that's accurate, Your Honor, and that's actually covered in (h)(5), because regardless of whether we respond to the notice in a (c) situation, we must respond to the subpoena. And I think that, the take-down and notice procedure throughout the legislative history of the statute itself is the primary remedy. Take material down quickly that's infringing. There's an ancillary identification provision that's tied by three express references and numerous implicit references in Section, subsection (h) to the take-down procedure. The one thing we know about the (a) function, the conduit function, where Verizon simply sends material between users' own personal computers, there is no take-down notice. Congress made a conscious decision not to put any notice that could form the basis for a subpoena in the conduit section. And that makes sense, because the service provider cannot be responsible for the material on a personal computer of an individual Internet user. It can't access that material, it can't do what the legislative history says that the take-down provision was designed to do. It says it was allowed —

[17] JUDGE ROBERTS: Well, Mr. McBride, it can disable access to that material by terminating the account.

MR. McBRIDE: But I think that analysis, (a) does not give the statutory language disable or remove the meaning it has throughout the statute, and throughout the entire 512, that language, disable or remove access to, is used with material that's hosted by the service provider that's available to the service provider. You look at (j) and you look at (i), termination of accounts. Very different language, can't be equated as the same thing, and in fact RIAA concedes the

notices that were served with these two subpoenas require nothing under the statute. Verizon didn't have to respond because there's no such thing as a take-down notification in the (a) context.

Now, how could Congress have tied this whole subpoena mechanism to the take-down provisions and then said that a meaningless take-down notice somehow satisfies the provisions of (c)(3)(A)? I think this reading makes the entire statute coherent. Their reading doesn't. And I think that's absolutely clear. You've got statutory anomalies that they've never been able to solve when you extend the subpoena [18] power to a place where there is no take-down notice. If you keep it within the take-down notice, within material under the service provider's control, everything makes sense. Even the reference to Rule 45 makes sense, because the service provider has access to the material and might actually be able to mount a defense, whereas, you know, we can't mount a defense for an individual subscriber. We don't have access to your home computer, nor should we. In fact, subsection (m) of this statute says Verizon should not be monitoring, ISPs should not be forced to monitor e-mail, web browsing, personal, private activity from your own computer. The fundamental difference between that and a user saying he's my website, Verizon, please host it on your server, it's the difference between billboards and a private telephone, and a private telephone —

JUDGE ROBERTS: The difference when Congress passed the statute, you didn't have the P2P technology that made the conduit functions present such a threat of piracy. You had the situation where you would post on a website.

That was the situation that posed the threat. The technology has now sort of eliminated that middleman, and my question is why [19] shouldn't we read the statute to apply to address the problem that Congress was concerned about, which is, of course, the copyright piracy?

MR. McBRIDE: S-O-N-Y. *Sony*, number one. Not for this Court or for the lower court to take a statute written to address one problem in the area of copyright and expand rights to others. There's a balance here. There are not only the interests of copyright owners. There's the interests of my client and the interests of millions, a hundred million people who use the Internet. This statute reflects a careful —

JUDGE ROBERTS: What is the interest of your client?

MR. McBRIDE: The interest of my client is in protecting our subscribers' privacy, privacy that we value and that is essential. Our subscribers —

JUDGE ROBERTS: You make a lot of money off of the piracy, don't you? I mean, in the sense that the people who are engaged in that activity use the higher-end services that you offer, that are more expensive.

MR. McBRIDE: That is a canard and I think it [20] should be rebutted now, and firmly. Verizon doesn't condone copyright infringement. We have no relationship with KaZaA or any of these other groups. We promote legitimate, paid music sites on our website, and we make money from that. When someone uses Rhapsody or MP3, we have arrangements with them. That's how we make money.

We don't make money when people use bandwidth to trade music in an unauthorized manner. We make money when they download music from the sites that we feature.

And I would also point out the idea that this is what's driving broadband, P2P, I think the Court well knows that Congress has always promoted, and the FCC, the development of broadband for numerous applications and that it's an important Congressional interest that broadband be promoted.

And I would point out also, Judge Roberts, in terms of the solution, Congress knew this statute wasn't the whole solution to the entire problem in (i). It specifically alluded to technological solutions that might be down the road, but I don't think it's for the Court, the district court recognized P2P wasn't a glimmer in the eye of Congress when it passed this statute. And the statute makes sense in [21] that regard.

JUDGE GINSBURG: Well, why do you say that? There was, I mean, it was the subject of news articles at that point.

MR. McBRIDE: Not P2P, Your Honor. Napster came into existence in '99, and P2P like this, KaZaA, was 2000. This did —

JUDGE GINSBURG: Well, the vehicle, then, was a file transfer protocol, right?

MR. McBRIDE: File transfer —

JUDGE GINSBURG: But it was the exact same problem.

MR. McBRIDE: I don't think it was, Your Honor, and I think if you read the legislative history through, the first thing you'll see is there's no mention of file transfer protocol. The conduit —

JUDGE GINSBURG: Well, you were suggesting a moment ago that this was just not even, you know, part of the universe in 1998.

MR. McBRIDE: Well, I think —

JUDGE GINSBURG: But the statute was passed at the end of the year. In March of that year, there's an article [22] in Salon, I think it is, that has, it talks about exactly this problem. The vehicle again was FTP, but it was talking about songs being downloaded, run, students in dormitories and colleges and so on using this device, and how much worse it's going to be in the future.

MR. McBRIDE: Well, I think the important point here is file transfer protocol is a computer language, just like HTTP. Neutral by itself. I think the question is the architecture that Congress was looking at in 1998 was the client-server architecture. The majority of infringement was actually software and it was downloaded from websites hosted by someone. It's like a wheel with spokes. This new architecture is like a fisherman's net, where every computer is both a server and a client. That did not exist. The conduit functions that Congress mentioned in the legislative history were e-mail and web browsing. And two points about those —

JUDGE GINSBURG: Well, now, here's exactly what it said on that point in March of '98. When cable modems are rolled out across the country, it will be easy for any regular home user to turn their own computer into an FTP [23] server offering MP3 files at very fast speeds. Thousands of new servers could pop up daily, creating a nightmare for record companies. Even today, an FTP site can have its IP address reassigned and not be found again for weeks. That's exactly what happened.

MR. McBRIDE: That's a news article, Your Honor. I would have to say that I would rely more heavily on the House and Senate reports to the actual legislation that discuss only e-mail and web browsing in the context of the conduit functions and discuss the infringement as piracy websites or online sites. So I don't think Congress any intent on this issue. Why is there no take-down notice in (a) if the conduit functions were seen as a problem? (a) has no take-down notice, and it has no requirement that the service provider not have actual or constructive knowledge of infringement. Congress knew (a) was different.

And I would point out even in Title 1 of the statute, which is about technological measures for the copyright owners to protect themselves, Congress built in Section 1205, privacy protection, and said even where the copyright owner is using some technological device, that device should not be [24] able to disclose the identity of individual users. And for RIAA to argue that in Title 2 Congress then created this sweeping subpoena power over the whole Internet.

And I would point out in that regard in terms of the First Amendment issue, the scope of copyright is unlimited. We know that. It's any expression, an e-mail, of any content, political, social commentary, anything, and I think the Supreme Court made quite clear that anonymous speech and association are important. And the fact of dissemination does not give up that right. The Federalist Papers were widely disseminated on a pseudonymous basis, and a statute that said, a statute that said Mark Twain could not publish as Mark Twain but had to give his name as Samuel Clemens would clearly violate the First Amendment. Here, that power is given to a private party based on what? An ex parte filing of a good-faith belief that someone's rights have been violated. Not a reasonable belief. Not a Rule 11 belief based on investigation, but a good-faith belief. What happens after that? The burden shifts not to the speaker but to the ISP to defend, and the ISP doesn't have access to the material. Now, that makes no sense at all, and I think it [25] points you —

JUDGE ROBERTS: You don't doubt, though, Mr. McBride, that the vast majority of the P2P activity is illegitimate copyright piracy, do you?

MR. McBRIDE: I disagree with that, Your Honor, and so does the Central District of California, which found under *Sony* that the distribution of this software was not contributory or vicarious infringement, because, in the words of Sony, it had substantial non-infringing uses.

JUDGE ROBERTS: The software, but the vast majority of the activity using the software is the exchange of copyrighted material.

MR. McBRIDE: And if that were so, and I don't think it's proven that, so, I mean, in this very record, Verizon did a demonstration where we downloaded the speeches of Martin Luther King. Anything can be exchanged on the software. I mean, Microsoft Word can be used for a number of infringing uses, but that doesn't mean that the product itself is somehow a contributory infringer, nor does it mean that Congress would authorize subpoenas to examine the contents or your Word files to determine if they're [26] infringing. I mean, in this sense, this is the VHS recorder. It's a new technology, and always with a new technology the copyright owners scream bloody murder and say, my God, you know, all the way from the piano roll to the VHS recorder. This statute was not meant to address that.

In fact, Congress is addressing peer-to-peer now. The Judiciary Committee held hearings last week. The Senate Commerce Committee has a hearing this week. The proper course when this statute was clearly written with other things under mind under *Sony* is to let Congress do its job and not try and extend the statute at numerous costs to values that Congress expressed in the statute itself. Thank you.

JUDGE ROBERTS: Mr. McBride, you've used your time, but we will give you a couple of minutes for rebuttal.

MR. McBRIDE: Thank you.

Appendix B

ORAL ARGUMENT OF DONALD B. VERRILLI, JR., ESQ. ON BEHALF OF THE APPELLEE RECORDING INDUSTRY ASSOCIATION OF AMERICA

[27] Good morning, and may it please the Court. By its terms, Section 512(h) requires Internet service providers to respond to subpoenas whether or not they are storing infringing material on their networks. That is what the statute says, and it is the only sensible reading of the statute. Congress would have had no reason to require service providers to provide us the identities of subscribers who infringe by storing material on computers on the service provider's network but to exempt service providers from giving us the identity of subscribers who infringe by using computers attached to the network. In —

JUDGE ROBERTS: Well, Congress saw a distinction between the two categories, because there is no take-down notice required under (a). There is under (b) through (d), and (h) refers to the take-down notice, so a logical explanation of that is that the subpoena power in (h) doesn't apply in the (a) situation.

MR. VERRILLI: I don't think so, Your Honor, I will work through the specifics of the statutory text, but permit [28] me to make a more general point first, and it's this. Subsections (a) through (d) define service, the service provider's own obligations and provide circumstances in (b), (c), and (d) where the service provider will lose the safe harbor that Section 512 otherwise gives it from secondary copyright infringement liability. And it makes sense to have

different rules in a situation where what you're talking about is the service provider's potential liability. It doesn't make sense to have different rules when what you're talking about is the obligation of the service provider to respond to a subpoena, and the reason for that is that we don't serve the subpoena so that we can enforce rights against the service provider. We serve the subpoena so that we can enforce rights against the infringing user of the system. And in that situation, the only way that we can assert our rights against an infringing user is if we know the identity of the infringing user. The only entity that knows the identity of the infringing user is the service provider. That's true when the material is stored on the service provider's network. It's true when the material is on the home computer. It's equally true.

[29] JUDGE WILLIAMS: That may make a lot of sense as a policy matter, but in terms of interpreting the language of Congress, I'm not sure it helps us much. To the extent that Congress clearly drew a distinction between removing infringing material on the one hand and cutting off access to a particular subscriber on the other, as it appears to have done, it looks as if it didn't create this authority for the current problem.

MR. VERRILLI: I respectfully disagree with that reading of the statute, Judge Williams. I don't think there's any doubt that as a matter of plain English and common sense that an Internet service provider can disable access to infringing material by terminating the subscriber who has the infringing material on his or her computer.

JUDGE GINSBURG: Well, that's a peculiar way of phrasing it, since they've talked elsewhere about terminating the subscriber, right? So disabling access and terminating the account seem to be different concepts.

MR. VERRILLI: Well, that's right. But I do think, I think they can be different concepts, but I do think that as a matter of plain English termination is a way of [30] disabling access, and after all, it's —

JUDGE GINSBURG: Now, wait a minute. You disable access to the material. You terminate the account.

MR. VERRILLI: That's —

JUDGE GINSBURG: Now, one may accomplish the other, but they are separate approaches that have been adopted at different places in the statute.

MR. VERRILLI: That's correct, but I think the key is that it does accomplish the other, and therefore this is, after all, I think —

JUDGE GINSBURG: Actually, what you terminate is the subscriber, not the account.

MR. VERRILLI: Well, that's right, but it does have the effect of disabling access to the infringing material, and therefore, as a matter of the plain language of subsection —

JUDGE GINSBURG: It has the effect of disabling access to everything, infringing or not infringing, right?

MR. VERRILLI: Including the infringing material, that's correct.

JUDGE GINSBURG: Yes, including that. So disabling [31] access to the material is a narrower concept.

MR. VERRILLI: It can be a narrower concept, but —

JUDGE GINSBURG: How can it be anything other than a narrower concept?

MR. VERRILLI: Well, it is a narrower concept, but it is still the case that that obligation, to the extent there is one in subsection (c)(3), is satisfied, because we've identified material that is infringing and that access to which could be disabled if it were terminated.

And I think, I do think that the key point here is that this is a significant over-reading of the role that subsection (c)(3) plays in defining the service provider's obligations. (c)(3), it doesn't function anywhere in the statute to define the substantive duties of the service provider. It is a notification provision. Its function is to put the service provider on notice that it has obligations under the statute. That's true when it's used in subsection (b) and it is used in subsection (b). It is true when it's used in subsection (c). It's true when it's used in subsection (d). And it's true when it's used in subsection (h). But in none of those four circumstances does the (c)(3) [32] itself define the scope of the obligation. The scope of the obligation —

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JUDGE ROBERTS: Well, but the subpoena only issues if, quoting under subsection (4), if the notification satisfies the provisions of (c)(3)(A).

MR. VERRILLI: Yes, and it does in this case, of course, because there are six requirements in (c)(3)(A). And there's no doubt, there's not even a dispute with respect to five of the six. It's clear that, it was a matter of plain English, we satisfied the sixth of the six. It's also clear in (c)(3)(B) that you satisfy (c)(3)(A) on the basis of substantial compliance, not —

JUDGE ROBERTS: Well, one of the things that (c)(3)(A), I think it's (A), talks about is an online site, and don't you have to read online site to mean my computer to apply it in the subsection (a) situation?

MR. VERRILLI: Well, I think, several responses to that. The word online site is preceded by the words or if. I mean, it says identify the infringing material, or if it's on an online site, multiple requirements, so I think the answer is no.

[33] JUDGE ROBERTS: Well, it says or if there are more than one on the online site.

MR. VERRILLI: Right.

JUDGE ROBERTS: I read that as meaning that that subsection (c) applies to an online site.

MR. VERRILLI: But beyond that, Your Honor, you're online, you're an online site when you're connected to their network, and it's —

JUDGE WILLIAMS: Have you found any actual usage of the term to mean that? I mean —

MR. VERRILLI: Yes.

JUDGE WILLIAMS: — I explored Google and got 344,000 hits, which I did not pursue further except for the first 50. I was wondering if you came up with one.

MR. VERRILLI: Well, the statute, in subsection (j) of 512 —

JUDGE WILLIAMS: Onsite location, I think —

MR. VERRILLI: — it says onsite location. That seems synonymous to me, an online site and online location, and in (j) it seems, it is by definition clear, because it's used in describing subsection (a) functions that an online [34] location is something other than a location on the subscriber's system. And so I think online site, online location are just synonymous, and so I don't think it has the meaning that the claim it does.

And I think (h)(5), far from supporting Verizon's position on this, makes clear that our reading of the text is correct, because what subsection (h)(5) does is uncouple the duty to respond to the notification from the duty to respond to the subpoena. And that's because they're two different things there in the statute for two different reasons. In (h)(5), the service provider is obligated to expeditiously respond to the subpoena even if it does not respond to the notification. And what that says is that even if the service provider decides

that it is not obliged to engage in a take-down because, for example, the material doesn't reside on its network, it's still independently obliged by operation of (h)(5) to respond to the subpoena. Congress expressly decoupled the two obligations.

JUDGE ROBERTS: Well, what is the purpose in a subsection (a) case, what is the purpose of the (c)(3) notice?

[35] MR. VERRILLI: The purpose of the —

JUDGE ROBERTS: Why would you require one in a subpoena for subsection (a)?

MR. VERRILLI: Because, it's for a functional reason, Judge Roberts. What the (c)(3) notice in the subpoena context is put the service provider on, you have to, there's six things in a notice. You have to identify yourself, you have to identify the material that you claim has been infringed, and you have to identify the material or activity you claim is infringing. You have to make the good-faith representation about your purposes. You have to tell them how to get in touch with you. It has a functional role under this statute, and it has a functional role under the subpoena. It says to —

JUDGE ROBERTS: But one function it doesn't have is requiring the service provider to do anything, right?

MR. VERRILLI: That's correct. Well, to do anything with respect to taking down the material. It's a prerequisite to them responding to the subpoena, and what it does, it's the mechanism that provides them the information they need

to match the IP address that we give them with the [36] actual subscriber and give it back to us, and it provides an assurance under the statute that indeed there is infringing activity going on and that this request is justified. So there's a very clear function that it's playing the role of putting the service provider on notice, which is the same exact role it plays under (b), (c), and (d). It plays that same role under all four.

JUDGE WILLIAMS: Can we go back to the relationship between (c)(3)(A)(iii) and the rest of the statute? There it talks of material, then I'm skipping, access to which is to be disabled. And then in (j)(1)(A), we have two different types of remedial orders. One, an order restraining the service provider from providing access to infringing material. Now, that seems to match the earlier language, the language in (c)(3)(A). Then we go on to this completely different thing, item 2, and what is the point of that on your theory? Because on your theory, disabling access encompasses shutting down a subscriber, right?

MR. VERRILLI: Well, one way, it's not the only way to disable access, but it's one way to disable access.

JUDGE WILLIAMS: Well, but, if, I mean, it [37] certainly suggests that these two propositions were viewed quite differently.

MR. VERRILLI: Well, but I think, Your Honor, if one understands the functions of the (c)(3) as a notification device triggering other obligations, then I think that the —

JUDGE WILLIAMS: But you're in the position of saying that the (c)(3) notice used here doesn't have to match the language of (c)(3), which seems to me a difficult proposition.

MR. VERRILLI: Well, we think it does match the language of (c)(3) for the reasons I've given. We think in —

JUDGE WILLIAMS: But that's only if the relationship between removal of material and termination of a subscriber is the relationship that you say it is.

MR. VERRILLI: And we also think that all that's required is substantial compliance, and substantial compliance has got to be measured in terms of the function that the notification provides, which is to allow them to respond to the subpoena in our case. We also think that that would make hash out of the fundamental goal of this statute. [38] After all, the point of the subpoena is to allow us to enforce our copyrights directly against the infringers. What the Internet service providers wanted out of Section 512(h) was not to be held responsible when they're passive conduits. What they gave in return is cooperation with us so that we can enforce our rights directly. If this reading of the statute is correct, the consequence is that we are disabled from enforcing our rights against the copyright owners directly, because we don't know who they are, and the only one who can tell us who they are is the service provider.

And if I may go back to the question of what was in the mind of Congress in 1998 when this act was passed, a few points. Although P2P was not yet a reality, there is no doubt

that Congress understood that infringement on the basis of home computers or servers operated independently and not as part of the network was a serious problem. That's reflected in the text of the statute itself. After all, Section (j)(1)(B) specifically provides for an injunctive remedy to terminate infringing subscribers when all that's going on is subsection (a) function. Had Congress been unconcerned about home computers and other servers being used [39] for infringement, that provision wouldn't be in there. Subsection (i), my friends at Verizon concede —

JUDGE GINSBURG: Excuse me, the one you just referred to was which?

MR. VERRILLI: (j)(1)(B).

JUDGE GINSBURG: (B), okay.

MR. VERRILLI: Subsection (i) similarly imposes on service providers providing (a) functions and all others the duty to have a policy of terminating repeat infringers and carrying out that policy, again reflecting Congress's concern.

JUDGE ROBERTS: But the underlying activity is very different in the subsection (a) situation and in, than it is in (b) through (d), and (b) through (d) you've got someone putting the stuff out there on a website for other people to copy. In (a), it's a very different situation. They're not putting it out. It's in their files.

MR. VERRILLI: Well —

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JUDGE ROBERTS: The most that they're doing, it seems to me, is equivalent to my leaving the door to my library open. Somebody might come in and copy one of my [40] books, but that doesn't make me liable for copyright infringement.

MR. VERRILLI: I disagree with that, Your Honor. The point of this file-sharing technology is to make your material available for copying by others. The point of its predecessors, file transfer protocol, was to make the material available for copying by others, and Congress had before it testimony in 1998 from the Department of Justice and from the Register of Copyright that there was about to be an explosion of potential infringement on the basis of home computer use. So it isn't, and we've cited in the footnotes at page 17 and page 18 of our brief.

Now, I know, you know, that it's said that legislative history, using legislative history is like looking at the audience and picking out your friends. There is a difference here between our position and Verizon's. We have some friends to pick out in the legislative history. Verizon has made some assertions that this wasn't in the mind of Congress, and they cite precisely nothing to substantiate the proposition that Congress had no interest in infringement on the basis of home computer use. They plainly did. It's [41] reflected in the statute. It's reflected in the legislative history. And of course after all, what Congress is doing here is legislating for the future, legislating in an environment that Congress understood was going to be dynamic and understood, and the Congress understood very well that we were on the precipice of a massive explosion of infringing potential.

That is exactly what happened. We are being victimized to it to a staggering extent every day of the week. The only way we can repair that is if we can assert our rights directly. The only we can do that is if we can obtain the identities of the subscribers.

JUDGE GINSBURG: Mr. Verrilli, I'm going to ask you to clarify one procedural point. Once a subscriber has been notified that there's a subpoena, what is the process by which the subscriber can assert a defense, fair use or what have you?

MR. VERRILLI: Well, it seems to me the subscriber, once the subscriber has been notified, the subscriber has two options. The subscriber can intervene in an enforcement proceeding, in the subpoena enforcement proceeding and try to assert his or her rights there. That has happened. It's [42] happening now, in fact. And alternatively, the subscriber can assert the fair use defense in the copyright infringement action that results from us obtaining the subscriber's identity and suing to enforce our rights. So there's no sense in —

JUDGE GINSBURG: Does it first get terminated?

MR. VERRILLI: Excuse me, Your Honor?

JUDGE GINSBURG: Does the subscriber first get terminated and then assert the fair use defense?

MR. VERRILLI: If the service provider decides that the subscriber needs to be terminated, then the subscriber will

be terminated. Of course, in that situation, I disagree with my friend Mr. McBride in his reading of the statute. There are remedies. For example, under (f), if termination occurs as a result of a misrepresentation by the copyright owner, then the service provider, because we believe disable access and termination mean the same thing, then the service provider will have, then the, excuse me, the subscriber will have a damages remedy against us for the misrepresentation, and in subsection (g), if a termination like that occurs and it's unwarranted, it seems quite clear to us that the service [43] provider would have the immunity that (g)(1) provides. So I think, I think the statute, it is possible that that would occur, but of course the statute requires a policy of terminating repeat infringers, and it would seem to me a very extreme burden to say that someone has to be actually adjudicated twice of having committed copyright infringement before that policy would require them to be terminated from the system.

JUDGE GINSBURG: Further questions? Thank you, Mr. Verrilli.

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ORAL ARGUMENT OF SCOTT R. McINTOSH, ESQ. ON BEHALF OF THE INTERVENOR UNITED STATES OF AMERICA

Good morning, Your Honor. May it please the Court. My name is Scott McIntosh, and I'm appearing on behalf of the United States, which has intervened in this case to defend the constitutionality of Section 512(h). As you know, the [44] constitutionality of this statute is being challenged on two heading, Article III and the First Amendment. Let me begin with Article III.

JUDGE ROBERTS: Mr. McIntosh, I was a little surprised by the Department's filing that you didn't address the statutory interpretation question. I know that in the past the Department has intervened to defend the constitutionality and defended the constitutionality by explaining that the statute should be interpreted to avoid the constitutional question. Should I read some implication into the fact that you didn't do that in this case?

MR. McINTOSH: No, Your Honor, I should, let me just make clear that although we did not address the statutory issue in this case, it is the position of the Copyright Office that the district court correctly interpreted the statute in that it does apply both to subsection (a) and subsection (c). We directed our briefing to the constitutional question because that's the scope of our submission under 2403, and it doesn't seem to us to be an appropriate case to construe the statute differently to avoid constitutional questions. I say that both because we don't [45] think the constitutional questions are substantial ones and because we don't think

that construing the statute would eliminate the constitutional questions. They'd simply shift their locus from (a) to (c).

JUDGE ROBERTS: The Copyright Office doesn't get any deference in this case, does it, to its view of statutory interpretation?

MR. McINTOSH: Well, we haven't presented their views in the course of the briefing, Your Honor, so we're not asking for deference on that score. But it might be a different matter if we had presented them, but that's not, we're here to address the constitutional question.

JUDGE GINSBURG: Well, let me ask you about that, because you seem to be addressing only one of the constitutional objections that's been, Article III objections that's been raised, and there's something I'm not getting about your brief, I think. Your opening point being that we needn't resolve whether this subpoena issue involves an exercise of judicial power, is that correct?

MR. McINTOSH: Well, I guess our submission, Your Honor, is that if one believes that it does involve the [46] exercise of judicial power, then it's entirely appropriate within the scope of Article III for this function to be performed as it's provided under the statute. We haven't addressed the alternative theory of the district court, namely that one can sustain this as something other than an exercise of Article III judicial power.

JUDGE GINSBURG: Even if you're correct on that, does that respond to the objection raised, the separation of powers objection?

MR. McINTOSH: Well, I think the, if I understand the separation of powers objection, Your Honor, it is an objection which comes into play only if one concludes there is no exercise of judicial power here. If this is a case involving the judicial power of the United States, I don't think there's a separation of powers problem by definition. And, you know, to our mind, there's no more of a separation of powers problem here and no more of an Article III problem than there is any case, any garden variety case where a court issues a subpoena, pardon me, a clerk issues a subpoena under the provisions of Rule 45, which of course are integrated into the statutory provision.

[47] The way the statute is set up, the preconditions for obtaining relief, for obtaining a subpoena under Section 512(h) ensure that there will be an actual Article III controversy present when the subpoena is issued. As you know, the statute requires that there be an identification of an infringing work or of an infringed work, of infringing material. There has to be a good-faith determination on the part of the parties seeking the subpoena that rights have been violated and unauthorized use has taken place under the copyright laws. There has to be a sworn submission and submissions under requirements of perjury that information is being sought solely to vindicate rights under Title 17, solely to obtain the identity of the infringer, and that the party seeking the subpoena is authorized to act on behalf of the copyright owner. When you take all of those requirements and put them together, they ensure that what is present is an actual controversy between, arising under federal law, between on the one hand a copyright owner and on the other hand the alleged infringer.

JUDGE WILLIAMS: Putting all that aside, isn't it absolutely clear the district court had jurisdiction over the [48] motion to quash in the second case?

MR. McINTOSH: I believe it did, Your Honor. I believe that —

JUDGE WILLIAMS: And unlike *Marbury v. Madison*, it's, there are two separate activities, the issuance of the subpoena and the motion to quash the subpoena, whereas in *Marbury*, there was a quest for mandamus, and the question was what do they have to do before they even consider the merits of that.

MR. McINTOSH: I would think, Your Honor, that if one grants for purposes of analysis the underlying claims that are being pressed by Verizon in the course of its motion to quash, if one assumes that there is some constitutional deficiency on the part of the issuance of the subpoena, that it is within the scope of the Court or would be under the scope of the Court under Article III to entertain a motion to quash, because that calls on it to adjudicate a question of federal right. So I don't think, I don't think there's a separate constitutional question or issue there.

JUDGE GINSBURG: All right, now, if I could go back to your theory in the case, Mr. McIntosh. Is the key to your [49] position here that there is in the background sufficiently close to the courthouse a controversy over a federal issue, namely copyright?

MR. McINTOSH: Yes, Your Honor.

JUDGE GINSBURG: You seem to be instancing in your brief also statutes that authorize the Court to act with regard to matters over which there is no such controversy, and you gave us the foreign and international tribunals assistance provision.

MR. McINTOSH: Yes, 1782.

JUDGE GINSBURG: 1782. So in your theory, that's unconstitutional.

MR. McINTOSH: No, Your Honor, we have two, we have two alternative theories presenting. One is —

JUDGE GINSBURG: I would hope and trust that each of them would preserve all of the statutes, since that's your assigned role.

MR. McINTOSH: Well, my assigned role, Your Honor, is to protect the Constitution out of all the statutes, and I hope that we will manage to do that under one or another theory. When you have a statute like 1782, it seems to us [50] that it reflects, it embodies a mechanism for enforcing an obligation which Congress has created, an obligation to comply with, under appropriate circumstances, foreign subpoenas, foreign discovery process, and Congress has the power under Article I to impose such an obligation within the scopes of its powers under international commerce. And so what 1782 does is recognize that obligation and create a mechanism for enforcing it. And that's within the scope of Article III, because there is this inchoate obligation that Congress has recognized to assist in foreign litigation, and

the Court can exercise its powers under Article III to give force to that.

JUDGE GINSBURG: Inchoate troubles me here. It sounds like penumbras. In other words, you can't find it in the Constitution.

MR. McINTOSH: No, it's not so much in the Constitution, Your Honor. I think what you're seeing in 1782 is that two things are sort of being folded into one another. The obligation to assist and the mechanism for enforcing that obligation are sort of simply, you know, appear side by side in the same provision, which simply says the Court can enter [51] an order essentially compelling people to do these things under appropriate circumstances.

JUDGE GINSBURG: You wouldn't have any problem, would you —

MR. McINTOSH: I guess implicit, implicit might be a better word than inchoate, Your Honor.

JUDGE GINSBURG: That's getting somewhat better. Emanations is better than penumbras. You wouldn't have any problem with the Congress directing the clerks of the courts to sell stamps, would you? They have a postal authority?

MR. McINTOSH: No, Your Honor, I don't think that would be an exercise of judicial power.

JUDGE GINSBURG: Therefore what?

MR. McINTOSH: No, and therefore nothing in the sense that I don't think there would be any compatibility problem. You have a different constitutional question. It wouldn't be one of Article III and is this outside the scope of judicial power. It would be is this a function that can be assigned to clerks under the usual sort of incompatibility, separation of powers analysis.

JUDGE GINSBURG: Yes, we're back in the separation [52] issue.

MR. McINTOSH: Yes, that's correct. But here, here it seems to me when you have a subpoena of the sort that courts conventionally issue under Rule 45, when you have a subpoena that's issued in the name of the Court, that it fits comfortably into the conventional judicial role and a role that is conventionally entrusted to clerks in an administerial fashion.

JUDGE GINSBURG: Now, I think you stopped short of this a little bit in the brief, but I don't think there's anything inconsistent with this. Are you, are you basically instancing a distinction between a case and a controversy, saying here there's no case, it hasn't been filed, but there is a controversy in the disjunctive, Article III is satisfied?

MR. McINTOSH: Well, I'm hesitant to put too much weight on that. I'm not sure the Supreme Court has drawn a particularly dramatic distinction between cases on the one hand and controversies on the other. But what I think —

JUDGE GINSBURG: Right, but we do have two terms.

MR. McINTOSH: But we do have two terms. And [53] what's clear —

JUDGE GINSBURG: And there is no case, right?

MR. McINTOSH: Well, there is no suit.

JUDGE GINSBURG: Yes, that's what you say, you keep saying there's no lawsuit, right?

MR. McINTOSH: There's no suit, and that's, but of course that's true under Rule 27, for example, Your Honor. When I come into court under Rule 27 to get a discovery order to allow me to get information for use in some future litigation, there is no pending suit. But that doesn't mean there's not a sufficient case or controversy in the Article III sense to support the exercise of jurisdiction. And the same thing is true here as well. But the provisions of the statute ensure that there is a live controversy out there, one that's capable of being brought —

JUDGE GINSBURG: Well, if it were just a case, if you were here seeking that subpoena and you said there's no doubt that it was a case or controversy, because you're using the disjunctive, that seems irrefutably true. There's a controversy, but I don't see any case.

MR. McINTOSH: Well, I guess my view, Your Honor, [54] I'm happy, I suppose, to look at it either way. One can view them disjunctively as two separate things. One can also

say that case in the Article III sense is something broader than or not tied to the formalities of a civil action under the federal rules. And I think the Supreme Court's made clear in cases like *Hayworth* that once you have an Article III case or controversy, or case or controversy in the Article III sense, Congress has broad discretion in figuring out what kinds of procedures will be used the courts in connection with those. There's no need to use to the conventional attributes of a complaint, an answer, and so forth.

JUDGE GINSBURG: That's your Rule 27.

MR. McINTOSH: I'm sorry?

JUDGE GINSBURG: That's your Rule 27 argument, right?

MR. McINTOSH: That's, yes, that's correct, Your Honor.

JUDGE GINSBURG: Yes, okay, thank you. Any questions? Thank you. Mr. McIntosh.

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[55] REBUTTAL ARGUMENT OF ANDREW G. McBRIDE, ESQ. ON BEHALF OF THE APPELLANT VERIZON INTERNET SERVICES, INC.

Your Honors, a couple of points. One, I think Judge Williams's point about the remedial provisions is irrefutable, that the remedial provisions divide two separate kind of remedies in (j), and one is termination of subscriber account, and the other one is disabling access to material on an online site. And I think that highlights the difference both between what an online site is and what a subscriber's account is and the scalpel of removing or disabling material from a particular website and the blunderbuss of terminating all Internet access of a particular subscriber. And I heard Mr. Verrilli say the notices in this case required no statutory response from Verizon. None at all. How can that be the notice that satisfies the provisions of (c)(3)(A)? It cannot. I heard a reference to Section (h)(5) of the statute, but (h)(5) contemplates a notice to which the service provider might well respond, because it says the service provider responds to the subpoenas regardless of its [56] response to the notice. But that can't be read to mean a notice to which the service provider would never have a statutory obligation to respond, and indeed, (h)(5) requires service of the notice at the time or before the time of the subpoena. Now, if the notice plays only an informational role, why would the notice ever be served before the subpoena? Under my friend's view, the only role of the notice is an informational one. But that's not what the statute says. And that gives two different meanings to the same notice in (c)(3)(A).

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I would also point out that in paragraph (3) of the subpoena provision, it specifically makes reference to identification of the alleged infringer of the material in the notification. And then you look at (c)(1), and we're told exactly what kind of material that is. It's material that resides on the network of the service provider.

And in fact the whole notification procedure in (c) is prefaced with the words to be effective under this subsection. And I don't think there's any way to read all the implicit, contextual, and explicit cross-references to see, to do anything other than tie the subpoena to the take-down notification process. And as has been pointed out, there's no take-[57]down process for (a), a conscious decision by Congress to omit the very predicate that's necessary for the subpoena.

Chief Judge Ginsburg asked a question about notice. There is no requirement in this statute of notice to the individual subscriber, and in other words, the *Eldred* safety valves I think the Court was referring to, fair use, the distinction between ideas and expression, those are not allowed to be asserted by the individual user because the subpoena goes to the service provider, and as we have discussed, the service provider has no control over the material. So how is my client in Rule 45 to mount an effective defense for our subscriber, not just in RIAA cases, but this statute is available to anyone who can claim a copyright. In fact, it's already being used by people much less responsible than RIAA. And my client cannot mount an effective fair use or idea/expression dichotomy defense, because we can't look at the hard drive of a personal

computer, and subsection (m) says that we don't have to and that it's not part of the statute. So I think the statutory [58] scheme makes perfect sense, even the reference to Rule 45, where the service provider has access to the material, and makes no sense when it does not.

There were some questions about Article III and the case or controversy provision. I happen to know, I believe the Supreme Court has said case is broader than controversy, because case includes criminal cases. And in fact, if you look at the Sixth Amendment, there the framers themselves drew a distinction between a criminal case and the compulsory process that a defendant is entitled to to resolve the case. I think it's impossible to argue that an ex parte request for a discovery tool presents a case or controversy to a federal court. It doesn't even ask for —

JUDGE ROBERTS: How is that any different than a search warrant?

MR. MCBRIDE: A search warrant involves another whole authority that, thank the Lord, RIAA doesn't possess, Article II authority. And that is a situation where the executive comes in and is using his authority, and I think that line and one the DOJ agrees with us on, I think, is the line between *Brenson* and *Morton Salt*. And Justice Jackson in [59] *Morton Salt* said, look, courts are not to act as administrative agencies or grand juries. That's not their role. They don't inquire outside of a pending case or controversy. The hard line drawn, picked up by Justice Kennedy in *Catholic Conference* in this very context, a subpoena context. I think that line has to be respected. Under DOJ's view, if this were a case or

controversy, every request for a discovery device in federal court would be its own independent case or controversy, and that can't be right. And in fact *Barwood* says that it's not right. Thank you, Your Honors.

JUDGE GINSBURG: Thank you, Mr. McBride. Thank you all. The case is submitted. The Court will take a brief recess.

(Recess.)